FILE COPY

SEP 26 1942
CHARLES ELMORE CROPLEY
CLERK

No. 424

In the Supreme Court of the United States

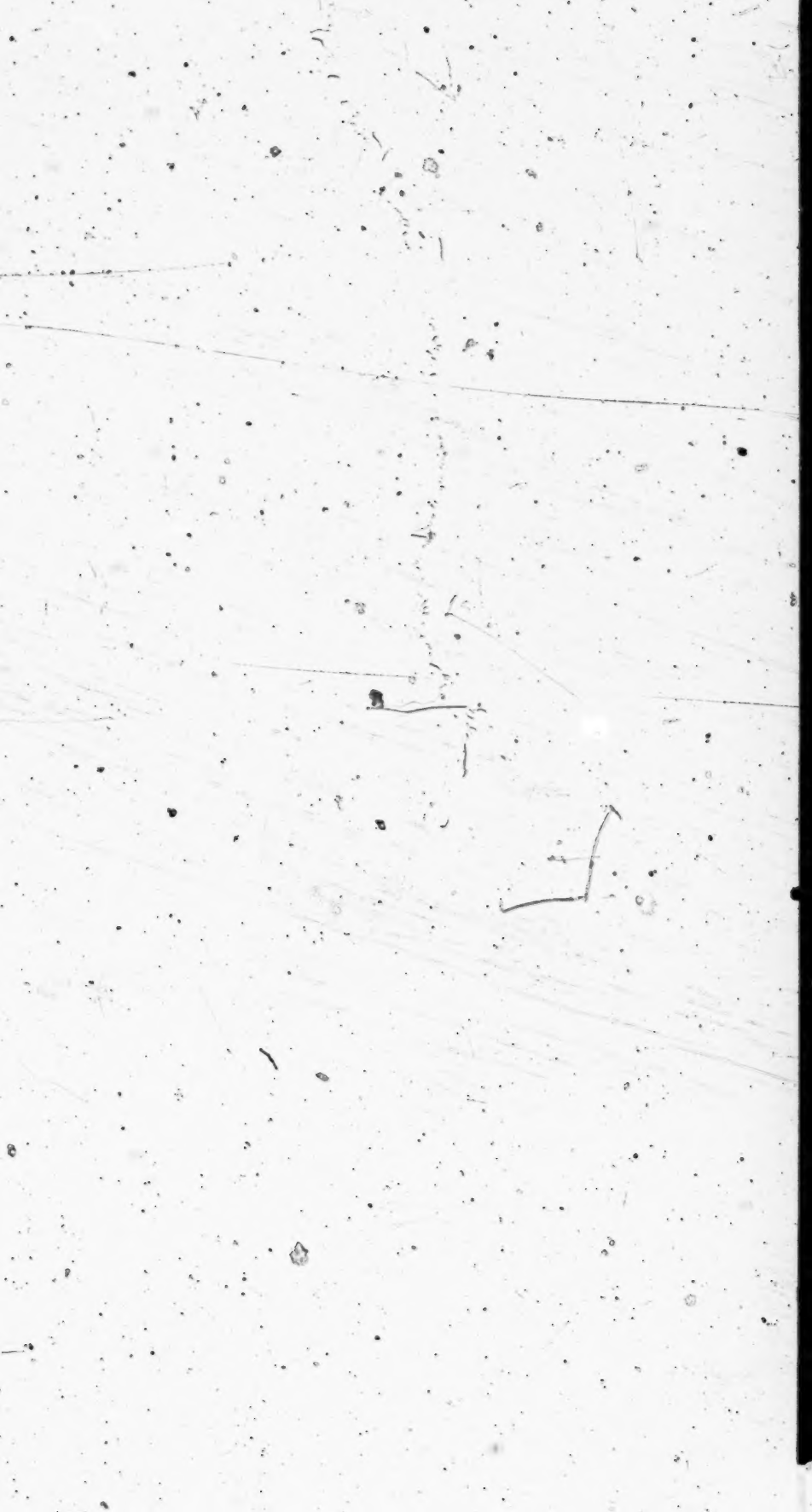
OCTOBER TERM, 1942

FEDERAL SECURITY ADMINISTRATOR, PETITIONER

v.

THE QUAKER OATS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT



INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	5
Specification of errors to be urged	10
Reasons for granting the writ	11
Conclusion	19

CITATIONS

Cases:	
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197	15
Federal Trade Commission v. *Raladam Co.*, 316 U. S. 149	17
Gray v. *Powell*, 314 U. S. 402	19
Houston v. *St. Louis Packing Co.*, 249 U. S. 479	17
National Labor Relations Board v. *Columbian Co.*, 306 U. S. 292	15
National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584	19
Railroad Commission v. *Oil Co.*, 310 U. S. 573	19
United States v. *Carolene Products Co.*, 304 U. S. 144	18
Statute:	
Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1046, 1055 (21 U. S. C. Sections 341 and 371):	
Section 401	3
Section 701	3
Miscellaneous:	
Regulations 15.130 and 15.140 of the Federal Security Administrator	10
7 Fed. Reg., p. 3055, April 25, 1942	6

485050—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. ——

FEDERAL SECURITY ADMINISTRATOR, PETITIONER

v.

THE QUAKER OATS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Security Administrator, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered June 26, 1942, setting aside regulations issued by the Federal Security Administrator under the Federal Food, Drug, and Cosmetic Act of 1938.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 679–689) is reported in 129 F. (2d) 76. Regulations 15.130 and 15.140 of the Federal Security Administrator are set forth at R. 637–638.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 26, 1942 (R. 689). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 701 (f) (4) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 52 Stat. 1046, 1055.

QUESTIONS PRESENTED

The ultimate question presented is whether regulations 15.130 and 15.140 of the Federal Security Administrator, excluding vitamin D from the definition and standard of identity for "farina" and permitting it only in "enriched farina" in which vitamin B_1, nicotinic acid and iron are required, are reasonable. This question depends in turn principally upon the subsidiary questions:

(a) whether there is substantial evidence in support of the Federal Security Administrator's finding that indiscriminate enrichment of farina with vitamin and mineral supplements would tend to confuse and mislead consumers; and

(b) whether, if so, the Administrator is entitled to consider such tendency to confuse and mislead consumers in reaching the conclusion that it would promote honesty and fair dealing in the interest of consumers to promulgate the standards of identity for farina and enriched farina.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1046, 1055 (21 U. S. C. Sections 341 and 371), in pertinent part, provides as follows:

> SEC. 401. Whenever in the judgment of the Administrator [1] such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container * * *. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. * * *
>
> * * * * * *
>
> SEC. 701 (e). The Administrator, on his own initiative or upon an application of any interested industry or substantial portion

[1] The terms "Federal Security Administrator" and "Administrator" have been substituted for the terms "Secretary of Agriculture" and "Secretary" because by Reorganization Plan No. IV, 54 Stat. 1234, the Federal Food and Drug Administration and its functions were transferred to the Federal Security Agency and the functions of the Secretary of Agriculture relating to the administration of the Act were transferred so as to be exercised by the Federal Security Administrator.

thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of the Act: 401 * * *. The Administrator shall give appropriate notice of the hearing, and the notice shall set forth the proposal in general terms and specify the time and place for a public hearing to be held thereon * * *. At the hearing any interested person may be heard in person or by his representative. As soon as practicable after completion of the hearing, the Administrator shall by order make public his action in issuing, amending, or repealing the regulation or determining not to take such action. The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based.

SEC. 701 (f) (1). In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order * * *.

* * * * * *

SEC. 701 (f) (3). The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently * * *. The findings of the

Administrator as to the facts, if supported by substantial evidence, shall be conclusive.

STATEMENT

On May 26, 1941, after notice and hearing as prescribed by Sec. 701 (e) of the Act, the Acting Federal Security Administrator promulgated regulations fixing and establishing definitions and standards of identity for "farina" and "enriched farina," and a number of related flour mill products (R. 628–639). Regulation 15.130 defines farina as the food prepared by grinding and bolting cleaned wheat other than durum wheat and red durum wheat to a prescribed fineness, with bran coat and germ removed to the extent that the percentage of ash in the final product, calculated to a moisture free basis, does not exceed .6 percent (R. 637).[2] Enriched farina under Regulation 15.140 is defined as farina conforming to Section 15.130 except that it must contain prescribed minimum quantities of vitamin B_1, riboflavin,[3] nicotinic acid and iron. The regulation also provides that enriched farina may contain as optional ingredients vitamin D, calcium, wheat germ and disodium phosphate (R. 637–639).

[2] The ash content is a measure of the degree of separation and removal of bran coat and germ from the endosperm of the wheat grain. See findings 6–11, 77 (R. 611–612, 625).

[3] Owing largely to the effects of war priorities and lend-lease requirements the effective date of the riboflavin provision has been postponed until April 20, 1943 (7 Fed. Reg., p. 3055, April 25, 1942).

The Quaker Oats Company manufactures a product consisting of plain farina plus vitamin D, which it markets as "Quaker Farina Wheat Cereal Enriched with Vitamin D" or "Quaker Farina Enriched by the Sunshine Vitamin" (R. 640). The Quaker Oats Company filed a petition for judicial review in the court below (R. 640-644) alleging that the effect of the standards for farina and enriched farina is to require it either to cease adding vitamin D and marketing its product as enriched, or to include in any farina which "purports to be or is represented as" enriched farina the prescribed minimum quantities of vitamin B_1, nicotinic acid and iron, in addition to the vitamin D which it now uses.[4] The petition further alleged that the regulations were invalid upon the grounds, *inter alia*, that they were unreasonable, not based upon substantial evidence, and beyond the statutory authority conferred upon the Administrator.

The Administrator's findings of fact relating to farina and the subject of vitamin and mineral enrichment (R. 617-619, 624-627) may be summarized as follows:

Manufacturers have recently placed on the market flours and farinas enriched with one or more vitamins and minerals (R. 617-618, 626). However, the composition of these enriched products varies widely and unless a standard which limits

[4] This allegation was not denied and was conceded by the Administrator in the court below.

the kinds and amounts of enrichment is adopted "the manufacturers' selection of the various nutritive elements and combinations of elements on the basis of economic and merchandising considerations is likely to lead to a great increase in the diversity, both qualitative and quantitative, in enriched flours. • • • Such diversity would tend to confuse and mislead consumers as to the relative value of and need for the several nutritional elements, and would impede rather than promote honesty and fair dealing in the interest of consumers" (R. 618). Indiscriminate enrichment with vitamins and minerals "would tend to confuse and mislead consumers by giving rise to conflicting claims regarding the beneficial effects" of various vitamins and minerals "and would be likely to lead to the impression on the part of consumers that a single article of food so enriched would meet all nutritional needs." On the other hand, "limited enrichment of selected staple foods • • • is readily adapted to the promotion of consumer understanding of the relative value of enriched and natural foods" (R. 618, 636).

The Administrator also found that pending experience with the use of enriched flour and enriched farina, consumer education and understanding would be facilitated by restricting enrichment, not only with respect to the ingredients to be contained

therein, but also by the fixing of minimum and, in the case of flour, maximum amounts of such ingredients (R. 619, 626).

Farina is manufactured by grinding wheat and separating the bran coat and germ of the grain from the endosperm. The finished product consists essentially of endosperm in particles larger than permissible in flour, the size of the particles being the principal characteristic distinguishing the product from flour. Consumers generally expect farina to be almost entirely free from bran coat and germ, and in this respect farina corresponds substantially to a fine grade of white flour known as "patent flour" (R. 624–625). Farina is used as a breakfast food and as an ingredient of macaroni products. It is also extensively used as a cereal food for children and in many cases is the only cereal food used during a period of their growth (R. 626).

The Administrator found that "the removal of bran coat and germ from endosperm in the manufacture of farina removes those parts of the wheat which are richest in vitamins and minerals" (R. 626). Recent investigations of the diets of persons in various sections and in various income groups have shown that in many cases the food consumed does not furnish sufficient amounts of these substances to maintain health. "Among the most serious and widespread deficiencies, in children as

well as adults, are those of vitamin B_1, riboflavin, nicotinic acid, and iron. Deficiencies of these vitamins tend to occur in the same individuals." There is also a deficiency of calcium in certain groups of the population and of vitamin D in large numbers of infants and children. Deficiencies are more prevalent in the cases of persons with low incomes (R. 617).

The Administrator also found that wheat contains a number of essential food elements which are deficient in many diets, including vitamin B_1, riboflavin, nicotinic acid, and iron. These are available as synthetic compounds and are suitable for the enrichment of flour and farina. To a limited extent vitamin D and calcium are also used as enrichments of flour and farina, but consumer education has generally recommended dairy products as the most desirable source of calcium and milk as the product most suitable for enrichment with vitamin D. It was found, however, that the addition of D and calcium as optional ingredients in enriched flour and enriched farina would be useful for those who consume insufficient dairy products (R. 618–619).

The findings further recite that farina enriched with vitamins and minerals has not acquired a common or usual name but that "an accurate designation for the product is 'enriched farina'" (R. 626–627).

Upon the basis of the foregoing findings and others subsidiary thereto the Administrator concluded that it would "promote honesty and fair dealing in the interest of consumers" to adopt the standards of identity for farina and enriched farina embodied in Regulations 15.130 and 15.140 (R. 627, 637–638). The Circuit Court of Appeals set aside the regulations on the ground that they exceeded the authority of the Administrator, were unreasonable, and were not supported by substantial evidence.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In setting aside Regulations 15.130 and 15.140 of the Federal Security Administrator fixing and establishing definitions and standards of identity for the foods "farina" and "enriched farina."

2. In holding that there was no evidence in support of the Administrator's finding that indiscriminate enrichment of farina with vitamins and minerals would tend to confuse and mislead consumers.

3. In holding that the Administrator is not entitled to consider such tendency to confuse and mislead in reaching the conclusion that it would promote honesty and fair dealing in the interest of consumers to promulgate the regulations under review.

4. In holding that the order was unreasonable in excluding vitamin D from "farina" and permit-

ting it only in "enriched farina," in which vitamin B_1, nicotinic acid and iron, are required.

5. In setting aside the farina and enriched farina standards in their entirety,[5] although petitioner claimed to be adversely affected by the order only insofar as it prohibits the addition to farina of vitamin D unaccompanied by other vitamins and minerals, and did not challenge the regulations in any other respect.

REASONS FOR GRANTING THE WRIT

1. This is the first case to be brought before this Court involving the important food standardization provisions of the Federal Food, Drug, and Cosmetic Act of 1938, and the scope of judicial review of orders of the Federal Security Administrator promulgating food standards.

The Administrator excluded vitamin D from the standard of farina and included it as an optional ingredient in the standard of enriched farina (in

[5] The formal judgment of the Circuit Court of Appeals R. 689) sets aside "the order of the Federal Security Administrator entered on May 26, 1941." Literally this judgment invalidates the standards for flour, enriched flour, bromated flour, enriched bromated flour, durum flour, self-rising flour, enriched self-rising flour, phosphated flour, whole wheat flour, bromated whole wheat flour, whole durum wheat flour, crushed wheat, cracked wheat and semolina, since standards for all of these products were included in the same order in which the farina and enriched farina regulations were also included. However, in the light of the closing two sentences of the opinion (R. 689) it is plain that the order was intended to be limited to "the regulations in controversy."

which other vitamins and minerals are required ingredients) in part upon the basis of independent evidence relating to the desirability of vitamin D and, in part upon evidence establishing that indiscriminate enrichment of farina tends to confuse and mislead consumers and therefore does not "promote honesty and fair dealing in the interest of consumers." The court below, however, set aside the Administrator's standards on the ground that the exclusion of vitamin D from farina and its inclusion in enriched farina as an optional ingredient accompanied by other required ingredients was unreasonable and without substantial support in the evidence and exceeded the Administrator's power. The court below reached this conclusion on the ground that there was no substantial evidence to support the Administrator's finding that indiscriminate enrichment of foods with vitamins and minerals tends to confuse and mislead consumers, and that, in any event, in issuing regulations pursuant to Section 401 of the Act, the Administrator may not consider such tendency to confuse and mislead since it is unrelated to the promotion of honesty and fair dealing in the interest of consumers. In the court's view the concept of the promotion of "honesty and fair dealing" involves only truth in labelling, at least as long as the added ingredients are harmless.

The conclusions of the court below jeopardize the food standards program. Under Section 401 the Administrator has promulgated standards for more

than 150 foods, and standards for numerous other foods are now being formulated. In most of the standards already promulgated, the Administrator has excluded or limited the quantity of one or more ingredients on the ground that their use would not promote honesty and fair dealing in the interest of consumers, although there was no evidence that the proposed ingredients were deleterious or that the proponents of these ingredients intended to misrepresent their products. The decision of the Circuit Court of Appeals in effect invalidates any standard which excludes a non-deleterious ingredient from an accurately labelled food. Thus if the standard of identity for farina must be broad enough to permit Quaker Oats Company to add vitamin D it must likewise permit other manufacturers to add other single vitamins or, indeed, any other nondeleterious substances, provided only that the label discloses the composition of the food. Upon the same principle the standard for enriched farina would have to be broad enough to encompass any nondeleterious variation from the formula specified by the order under review which the producer was willing to disclose by labelling. In short, in the view of the court below, the Administrator is compelled to include in the definition of any food a blanket clause which would permit any manufacturer to add as an additional ingredient any nondeleterious element.

2. The Administrator's finding that indiscriminate enrichment would tend to confuse and mislead

consumers is clearly supported by substantial evidence.

The evidence establishes that there was a wide variation in nutritive supplementation of flour and farina. Thus, the Cream of Wheat Corporation, after extensive investigation, had been supplementing farina with calcium, vitamin B_1, phosphorus and iron (R. 268–269). Pillsbury Flour Mills markets a farina to which only vitamin B_1 is added (R. 609). The Quaker Oats Company was the only manufacturer shown to be adding only vitamin D to farina, and it had varied the quantities added from 121 U. S. P. units per ounce to 1000 U. S. P. units per ounce and most recently to 400 U. S. P. units per ounce (R. 222). In respect of the additional variations in enrichment in flour manufacture * the record shows no less than eight different combinations in vogue (R. 53, 69–70, 75, 118, 130, 161, 197, 562). Yet the whole program of vitamin and mineral enrichment is still in its infancy. The record warrants the conclusion that without controls new "enrichments" will be put forth without scientific or nutritional basis but designed to facilitate exaggerated, if not false, advertising concerning the merits of the new products. For example, one manufacturer of flour admitted in the hearings that he listed vitamin E as a bene-

* The evidence and findings as to enrichment of flour were expressly made applicable to enrichment of farina. See R. 172, 217, 422; Finding 83, R. 626.

ficial element introduced in his product, although need for enrichment of foods with vitamin E has not been established (R. 73; Finding 42, R. 619).

Consumer representatives (R. 116, 488), disinterested scientists (R. 101–103, 104, 409, 413), representatives of affected industries (R. 44, 137), and government food and drug experts (R. 177, 178, 184) testified that indiscriminate enrichment would encourage advertising abuses, and lead to either a general and unwarranted scepticism concerning the enrichment program or to a dangerous credulity. Although the court below rejected this testimony as "speculative and conjectural" (R. 686), the Administrator was plainly entitled to give it weight and was not required to disregard the impressive consensus of this testimony merely because the opinions of necessity dealt with probable future effects of present trends. The terms of Section 401 require the Administrator to make a judgment *in futuro*, namely, that standardization "will promote honesty and fair dealing in the interest of consumers." In improperly equating informed forecast with conjecture, with the result of overturning Findings 36 and 37, the court below ignored the rule of conclusiveness of administrative findings embodied in Section 701 (f) (3) of the Act and in the decisions of this Court. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229; *National Labor Relations Board* v. *Columbian Co.*, 306 U. S. 292, 299–300.

3. Plainly, therefore, the evidence supported the Administrator's finding that indiscriminate enrichment of foods by multiple variations tends to confuse and mislead consumers. The court below, however, held that in any event consumer confusion was not an element which the Administrator is entitled to consider in fixing standards of food, since in the court's view the elimination of the resulting consumer confusion does not promote honesty and fair dealing in the interest of consumers (R. 686).

But the Administrator was clearly reasonable and justified in concluding that honesty and fair dealing in the interests of consumers are promoted by the elimination of the type of consumer confusion here shown by the evidence to be engendered by the indiscriminate enrichment of foods. Indeed, in so far as such matters are susceptible of evidentiary proof, the very evidence which establishes consumer confusion (*supra*, pp. 13–15) also establishes that such confusion is an obstacle to honesty and fair dealing in the interest of consumers. The program of indiscriminate enrichment gives rise to conflicting and exaggerated claims and encourages advertising abuses (*supra*, p. 15); unable to make an intelligent choice from among the multiple variations clamoring for his purchase, the consumer is a ready victim of conflicting and unwarranted claims. The ill-advised skeptic will pay as much for plain farina as for the superior product, enriched farina (cf. R. 413); the credulous can be persuaded to pay as much for one vitamin as for

four (cf. R. 177). There can, in these circumstances, be small assurance that the consumer will be able to select the foods which are, in fact, what he wishes. Consumer confusion created by indiscriminate enrichment, therefore, has an immediate bearing upon the promotion of honesty and fair dealing in the interest of consumers, and not, as the court below thought, exclusively upon public health (R. 684). And plainly the prevention of such potentialities of unfair dealing, arising from the consumer's confusion, is a legitimate objective under the Food, Drug and Cosmetic Act. Cf. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 152. This being so, it was for the Administrator, not the court, to determine, within the limits of reasonableness, the reach of the regulation in order to eliminate the confusion. In holding that label disclosure of ingredients is a better guaranty against confusion and deception of consumers than the standardization ordered by the Administrator, the court below disregarded the principle, long since established by this Court, that it is for the administrative agency and not the reviewing court to say whether accurate labelling of a food constitutes sufficient protection against deception of consumers.[1] *Houston* v. *St. Louis Packing Co.*,

[1] The Circuit Court of Appeals misconceived the argument relative to confusion when it stated that sale of Quaker's farina, accurately labelled as to ingredients, would confuse consumers less than sale of standardized enriched farina which need not, under Section 403 (g), be labelled to disclose required ingredients. The Government did not contend

249 U. S. 479, 484; cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144.

4. Apart from the evidence that indiscriminate enrichment of foods by such ingredients as vitamin D creates consumer confusion other evidence also supports the exclusion of vitamin D from the definition of farina. Thus, the evidence establishes that persons deficient in one vitamin are likely to be deficient in several (R. 287). One physician stated, "It is practically impossible to find a single dietary deficiency in clinical practice * * *" (R. 366). Similarly, a nutrition expert, testifying on behalf of respondent, endorsed the principle of multiple enrichment (R. 95, 220–221). Further, the record shows that the American Medical Association and the Bureau of Home Economics, Department of Agriculture, were opposed to the use of vitamin D in flour and farina (R. 102–103, 497).[8] In these circumstances it was plainly reasonable

---

that the sale of any particular product would be confusing or misleading, but only that an unrestricted diversity of products, even though honestly labelled, will tend to confuse and mislead consumers.

[8] This opposition was presumably based upon the considerations that vitamin D is not present in significant quantities in whole wheat and is therefore not one of the substances lost by over-refinement (R. 91, 116, 298); that the primary function of vitamin D is to facilitate the absorption of calcium, a mineral which is found in dairy foods and not in cereals (R. 79, 81, 83, 104, 298, 367); and that it is not established that adults are deficient in vitamin D (R. 368, 390).

There was clearly no basis for holding the regulations unreasonable on the ground that they will "deprive" many consumers of vitamin D, or at least prevent the consumer

for the Administrator to exclude vitamin D from farina while permitting it as an optional ingredient in enriched farina where it appears in combination with other required enriching elements.

It is evident that in holding the regulations unreasonable the court below substituted its own judgment for that of the Administrator "in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art." *Railroad Commission* v. *Oil Co.*, 310 U. S. 573, 581; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596–597; *Gray* v. *Powell*, 314 U. S. 402, 412.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1942.

---

from obtaining vitamin D in farina unless he buys enriched farina (R. 687). As the record shows, the consumer who requires D is likely to require other vitamins as well; in any event he will not suffer any disadvantage from the extra nutrients in enriched farina: There is no showing that enriched farina with vitamin D added would not be readily available at no appreciable extra cost or that vitamin D will not otherwise be obtainable.

U. S. GOVERNMENT PRINTING OFFICE: 1942